Calendar No. 708

100TH CONGRESS
2d Session

SENATE

REPORT
100-375

FEDERAL LAND EXCHANGE FACILITATION ACT OF 1988

MAY 27 (legislative day, MAY 18), 1988.—Ordered to be printed

Mr. JOHNSTON, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany H.R. 1860]

The Committee on Energy and Natural Resources, to which was referred the Act (H.R. 1860) entitled the "Federal Land Exchange Facilitation Act of 1987", having considered the same, reports favorably thereon with an amendment to the text and an amendment to the title and recommends that the Act, as amended, do pass.

The amendments are as follows:

1. Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Land Exchange Facilitation Act of 1988".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds and declares that—

(1) land exchanges are a very important tool for Federal and State land managers and private landowners to consolidate Federal, State, and private holdings of land or interests in land for purposes of more efficient management and to secure important objectives including the protection of fish and wildlife habitat and aesthetic values; the enhancement of recreation opportunities; the consolidation of mineral and timer holdings for more logical and efficient development; the expansion of communities; the promotion of multiple-use values; and fulfillment of public needs;

(2) needs for land ownership adjustments and consolidation consistently outpace available funding for land purchases by the Federal Government and thereby make land exchanges an increasingly important method of land acquisition and consolidation for both Federal and State land managers and private landowners;

(3) the Federal Land Policy and Management Act of 1976 and other laws provide a basic framework and authority for land exchanges involving lands under the jurisdiction of the Secretary of the Interior and the Secretary of Agriculture; and

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(4) such existing laws are in need of certain revisions to streamline and facilitate land exchange procedures and expedite exchanges.

(b) PURPOSES.—The purposes of this Act are—

(1) to facilitate and expedite land exchanges pursuant to the Federal Land Policy and Management Act of 1976 and other laws applicable to exchanges involving lands managed by the Departments of the Interior and Agriculture by—

(A) providing more uniform rules and regulations pertaining to land appraisals which reflect nationally recognized appraisal standards; and

(B) establishing procedures and guidelines for the resolution of appraisal disputes.

(2) to provide sufficient resources to the Secretaries of the Interior and Agriculture to ensure that land exhange activities can proceed consistent with the public interest; and

(3) to require a study and report concerning improvements in the handling of certain information related to Federal and other lands.

SEC. 3. LAND EXCHANGES AND APPRAISALS.

(a) FLPMA AMENDMENTS.—Section 206 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716) is hereby amended by adding the following new subsections:

"(d)(1) No later than ninety days after entering into an agreement to initiate an exchange of land or interests therein pursuant to this Act or other applicable law, the Secretary concerned and other party or parties involved in the exchange shall arrange for an appraisal (to be completed within a time frame and under such terms as are negotiated by the parties) of the lands or interest therein involved in the exchange in accordance with subsection (f) of this section.

"(2) If within one hundred and eighty days after the submission of an appraisal or appraisals for review and approval by the Secretary concerned, the Secretary concerned and the other party or parties involved cannot agree to accept the findings of an appraisal or appraisals, the appraisal or appraisals shall be submitted to an arbitrator appointed by the Secretary from a list of arbitrators submitted to him by the American Arbitration Association for arbitration to be conducted in accordance with the real estate valuation arbitration rules of the American Arbitration Association. Such arbitration shall be binding for a period of not to exceed two years on the Secretary concerned and the other party or parties involved in the exchange insofar as concerns the value of the lands which were the subject of the appraisal or appraisals.

"(3) Within thirty days after the completion of the arbitration, the Secretary concerned and the other party or parties involved in the exchange shall determine whether to proceed with the exchange, modify the exchange to reflect the findings of the arbitration or any other factors, or to withdraw from the exchange. A decision to withdraw from the exchange may be made by either the Secretary concerned or the other party or parties invovled.

"(4) Instead of submitting the appraisal to an arbitrator, as provided in paragraph (2) of this section, the Secretary concerned and the other party or parties involved in an exchange may mutually agree to employ a process of bargining or some other process to determine the values of the properties involved in the exchange.

"(5) The Secretary concerned and the other party or parties involved in an exchange may mutually agree to suspend or modify any of the deadlines contained in this subsection.

"(e) Unless mutually agreed otherwise by the Secretary concerned and the other party or parties involved in an exchange pursuant to this Act or other applicable law, all patents or titles to be issued for land or interests therein to be acquired by the Federal Government and lands or interest therein to be transferred out of Federal ownership shall be issued simultaneously after the Secretary concerned has taken any necessary steps to assure that the United States will receive acceptable title.

"(f)(1) Within one year after the enactment of subsections (d) through (i) of this section, the Secretaries of the Interior and Agriculture shall promulgate new and comprehensive rules and regulations governing exchanges of land and interests therein pursuant to this Act and other applicable law. Such rules and regulations shall fully reflect the changes in law made by subsections (d) through (i) of this section and shall include provisions pertaining to appraisals of lands and interests therein involved in such exchanges.

"(2) The provisions of the rules and regulations issued pursuant to paragraph (1) of this subsection governing appraisals shall reflect nationally recognized appraisal standards, including, to the extent appropriate, the Uniform Appraisal Standards

for Federal Land Acquisitions: *Provided, however,* That the provisions of such rules and regulations shall—

"(A) ensure that the same nationally approved appraisal standards are used in appraising lands or interest therein being acquired by the Federal Government and appraising lands or interests therein being transferred out of Federal ownership; and

"(B) with respect to costs or other responsibilities or requirements associated with land exchanges—

"(i) recognize that the parties involved in an exchange may mutually agree that one party (or parties) will assume, without compensation, all or part of certain costs or other responsibilities or requirements ordinarily borne by the other party or parties; and

"(ii) also permit the Secretary concerned, where such Secretary determines it is in the public interest and it is in the best interest of consummating an exchange pursuant to this Act or other applicable law, and upon mutual agreement of the parties, to make adjustments to the relative values involved in an exchange transaction in order to compensate a party or parties to the exchange for assuming costs or other responsibilities or requirements which would ordinarily be borne by the other party or parties.

"As used in this subparagraph, the term 'costs or other responsibilities or requirements' shall include, but not be limited to, costs or other requirements associated with land surveys and appraisals, mineral examinations, title searches, archeological surveys and salvage, removal of encumbrances, arbitration pursuant to subsection (d) of this section, curing deficiencies preventing highest and best use, and other costs to comply with laws, regulations and policies applicable to exchange transactions, or which are necessary to bring the Federal or no-Federal lands or interests involved in the exchange to their highest and best use for the appraisal and exchange purposes. Prior to making any adjustments pursuant to this subparagraph, the Secretary concerned shall be satisfied that the amount of such adjustment is reasonable and accurately reflects the approximate value of any costs or services provided or any responsibilities or requirements assumed.

"(g) Until such time as new and comprehensive rules and regulations governing exchange of land and interests therein are promulgated pursuant to subsection (f) of this section, land exchanges may proceed in accordance with existing laws and regulations, and nothing in the Act shall be construed to require any delay in, or otherwise hinder, the processing and consummation of land exchanges pending the promulgation of such new and comprehensive rules and regulations. Where the Secretary concerned and the party or parties involved in an exchange have agreed to initiate an exchange of land or interests therein prior to the day of enactment of such subsections, subsections (d) through (i) of this section shall not apply to such exchanges unless the Secretary concerned and the party or parties involved in the exchange mutually agree otherwise.

"(h)(1) Notwithstanding the provisions of this Act and other applicable laws which require that exchanges of land or interests therein be for equal value, where the Secretary concerned determines it is in the public interest and that the consummation of a particular exchange will be expedited thereby, the Secretary concerned may exchange lands or interests therein which are of approximately equal value in cases where—

"(A) the combined value of the lands or interests therein to be transferred from Federal ownership by the Secretary concerned in such exchange is not more than $150,000; and

"(B) the Secretary concerned finds in accordance with the regulations to be promulgated pursuant to subsection (f) of this section that a determination of approximately equal value can be made without formal appraisals, as based on a statement of value made by a qualified appraiser and approved by an authorized officer; and

"(C) the definition of and procedure for determining 'approximately equal value' has been set forth in regulations by the Secretary concerned and the Secretary concerned documents how such determination was made in the case of the particular exchange involved.

"(2) As used in this subsection, the term 'approximately equal value' shall have the same meaning with respect to lands managed by the Secretary of Agriculture as it does in the Act of January 22, 1983 (commonly known as the 'Small Tracts Act').

"(i)(1) Upon receipt of an offer to exchange lands or interests in lands pursuant to this Act or other applicable laws, at the request of the head of the department of agency having jurisdiction over the lands involved, the Secretary of the Interior may temporarily segregate the Federal lands under consideration for exchange from

appropriation under the mining laws. Such temporary segregation may only be made for a period of not to exceed five years. Upon a decision not to proceed with the exchange or upon deletion of any particular parcel from the exchange offer, the Federal lands involved or deleted shall be promptly restored to their former status under the mining laws. Any segregation pursuant to this paragraph shall be subject to valid existing rights as of the date of such segregation.

"(2) All non-Federal lands which are acquired by the United States through exchange pursuant to this Act or pursuant to other law applicable to lands managed by the Secretary of Agriculture shall be automatically segregated from appropriation under the public land law, including the mining laws, for ninety days after acceptance of title by the United States. Such segregation shall be subject to valid existing rights as of the date of such acceptance of title. At the end of such ninety day period, such segregation shall end and such lands shall be open to operation of the public land laws and to entry, location, and patent under the mining laws except to the extent otherwise provided by this Act or other applicable law, or appropriate actions pursuant thereto.".

(b) CONFORMING AMENDEMNT.—The first sentence of section 206(b) (43 U.S.C. 1716(b)) of the Federal Land Policy and Management Act of 1976 is hereby amended by inserting the word "concerned" after the words "the Secretary".

(c) ADDITIONAL AMENDMENT.—Section 206(c) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716(c)) is hereby amended to read as follows:

"(c) Lands acquired by the Secretary by exchange under this section which are within the boundaries of any unit of the National Forest System, National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Trails System, National Wilderness Preservation System, or any other system established by Act of Congress, or the boundaries of the California Desert Conservation Area, or the boundaries of any national conservation area or national recreation area established by Act of Congress, upon acceptance of title by the United States shall immediately be reserved for and become a part of the unit or area within which they are located, without further action by the Secretary, and shall thereafter be managed in accordance with all laws, rules, and regulations applicable to such unit or area.".

SEC. 4. LAND EXCHANGE FUNDING AUTHORIZATION.

In order to ensure that there are increased funds and personnel available to the Secretaries of the Interior and Agriculture to consider, process, and consummate land exchanges pursuant to the Federal Land Policy and Management Act of 1976 and other applicable law, there are hereby authorized to be appropriated for fiscal years 1989 through 1998 an annual amount not to exceed $4,000,000 which shall be used jointly or divided among the Secretaries as they determine appropriate for the consideration, processing, and consummation of land exchanges pursuant to the Federal Land Policy and Management Act of 1976, as amended, and other applicable law. Such moneys are expressly intended by Congress to be in addition to, and not offset against, moneys otherwise annually requested by the Secretaries, and appropriated by Congress for land exchange purposes.

SEC. 5. SAVING CLAUSE.

Nothing in this Act shall be construed as amending the Alaska Native Claims Settlement Act (Public Law 92-203, as amended) or the Alaska National Interest Lands Conservation Act (Public Law 96-487, as amended) or as enlarging or diminishing the authority with regard to exchanges conferred upon either the Secretary of the Interior or the Secretary of Agriculture by either such Acts. If any provision of this Act or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby. Nothing in this Act shall be construed to change the discretionary nature of land exchanges or to prohibit the Secretary concerned or any other party or parties involved in a land exchange from withdrawing from the exchange at any time, unless the Secretary concerned and the other party or parties specifically commit otherwise by written agreement.

SEC. 6. NFMA AMENDMENTS.

Section 17(b) of the National Forest Management Act of 1976 is hereby amended—

(1) by striking out "$25,000" and inserting in lieu thereof "$150,000";

(2) by striking out "and" at the end of paragraph (3);

((3) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; and"; and

(4) by adding after paragraph (4) the following:

"(5) any adjustment made by the Secretary of relative value pursuant to section 206(f)(2)(B)(ii) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716).".

SEC. 7. ADDITIONAL AMENDMENTS.

The Act of July 26, 1956 (70 Stat. 656, 16 U.S.C. 505a, 505b) is hereby amended as follows:

(a) The words "national forest lands" are hereby deleted wherever they occur, and the words "National Forest System lands" are inserted in lieu thereof.

(b) The words "a national forest" are hereby deleted in the first paragraph, and the words "a unit of the National Forest System" are inserted in lieu thereof.

(c) The following sentence is hereby added at the end of the second paragraph: "Lands interchanged under the authority of this Act shall be deemed to include interests in lands.".

SEC. 8. LAND INFORMATION STUDY.

(a) STUDY.—The Secretary of the Interior shall conduct an assessment of the need for and cost and benefits associated with improvements in the existing methods of land surveying and mapping and of collecting, storing, retrieving, disseminating, and using information about Federal and other lands.

(b) CONSULTATION.—In conducting the assessment required by this section, the Secretary of the Interior shall consult with the following—

(1) the Secretary of Agriculture;

(2) The Secretary of Commerce;

(3) the Director of the National Science Foundation;

(4) representatives of State and local governments;

(5) representatives of private sector surveying and mapping science.

(c) REPORT.—No later than one year after the day of enactment of this Act, the Secretary of the Interior shall report to the Congress concerning the results of the assessment required by this section.

(d) TOPICS.—In the report required by subsection (c), the Secretary of the Interior shall include a discussion and evaluation of the following:

(1) relevant recommendations made by the National Academy of Sciences (National Research Council) on the concept of a multipurpose cadastre from time to time prior to the date of enactment of this Act;

(2) ongoing activities concerning development of an overall reference frame for land and resource information, including but not limited to a geodetic network, a series of current and accurate large-scale maps, cadastral overlay maps, unique identifying numbers linking specific land parcels to a common index of all land records in United States cadastral systems, and a series of land data files;

(3) ways to achieve better definition of the roles of Federal and other governmental agencies and the private sector in dealing with land information systems;

(4) ways to improve the coordination of Federal land information activities; and

(5) model standards developed by the Secretary for compatible multipurpose land information systems for use by Federal, State and local governmental agencies, the public, and the private sector.

(e) RECOMMENDATIONS.—The report required by subsection (c) may also include such recommendations for legislation as the Secretary of the Interior considers necessary or desirable.

SEC. 9. CASH EQUALIZATION WAIVER.

Subsection 206(b) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716(b) is hereby amended by adding the following at the end of the third sentence thereof:

"The Secretary concerned and the other party or parties involved in the exchange may mutually agree to waive the requirement for the payment of money to equalize values where the Secretary concerned determines that the exchange will be expedited thereby and that the public interest will be better served by such a waiver of cash equalization payments and where the Secretary and where the amount to be waived is no more than 3 per centum of the value of the lands being transferred out of Federal ownership or $15,000, whichever is less.".

SEC. 10. TEMPORARY REVOCATION AUTHORITY.

(a) When the sole impediment to consummation of an exchange of lands or interests therein (hereinafter referred to as an exchange) determined to be in the public

interest, is the inability of the Secretary of the Interior to revoke, modify, or terminate part or all of a withdrawal or classification because of the order (or subsequent modification or continuance thereof) of the U.S. District Court for the District of Columbia dated February 10, 1986 in Civil Action no. 85–2238 *(National Wildlife Federation* v. *Robert F. Burford, et al.)*, the Secretary of the Interior is hereby authorized, notwithstanding such order (or subsequent modification or continuance thereof), to use the authority contained herein, in lieu of other authority provided in this Act including section 204, to revoke, modify, or terminate in whole or in part, withdrawals or classifications to the extent deemed necessary by the Secretary to enable the United States to transfer land or interests therein out of Federal ownership pursuant to an exchange.

(b) REQUIREMENTS.—The authority specified in subsection (a) of this section may be exercised only in cases where—

(1) a particular exchange is proposed to be carried out pursuant to this Act, as amended, or other applicable law authorizing such an exchange;

(2) the proposed exchange has been prepared in compliance with all laws applicable to such exchange;

(3) the head of each Federal agency managing the lands proposed for such transfer has submitted to the Secretary of the Interior a statement of concurrence with the proposed revocation, modification, or termination;

(4) at least sixty days have elapsed since the Secretary of the Interior has published in the Federal Register a notice of the proposed revocation, modification, or termination; and

(5) at least sixty days have elapsed since the Secretary of the Interior has transmitted to the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the United States Senate a report which includes—

(A) a justification for the necessity of exercising such authority in order to complete an exchange;

(B) an explanation of the reasons why the continuation of the withdrawal or a classification or portion thereof proposed for revocation, modification, or termination is no longer necessary for the purposes of the statutory or other program or programs for which the withdrawal or classification was made or other relevant programs;

(C) assurances that all relevant documents concerning the proposed exchange or purchase for which such authority is proposed to be exercised (including documents related to compliance with the National Environmental Policy Act of 1969 and all other applicable provisions of law) are available for public inspection in the office of the Secretary concerned located nearest to the lands proposed for transfer out of Federal ownership in furtherance of such exchange and that the relevant portions of such documents are also available in the offices of the Secretary concerned in Washington, D.C.; and

(D) an explanation of the effect of the revocation, modification, or termination of a withdrawal or classification or portion thereof and the transfer of lands out of Federal ownership pursuant to the particular proposed exchange, on the objectives of the land management plan which is applicable at the time of such transfer to the land to be transferred out of Federal ownership.

(c) LIMITATIONS.—(1) Nothing in this section shall be construed as affirming or denying any of the allegations made by any party in the civil action specified in subsection (a), or as constituting an expression of Congressional opinion with respect to the merits of any allegation, contention or argument made or issue raised by any party in such action, or as expanding or diminishing the jurisdiction of the U.S. District Court for the District of Columbia.

(2) Except as specifically provided in this section, nothing in this section shall be construed as modifying, terminating, revoking, or otherwise affecting any provision of law applicable to land exchanges, withdrawals, or classifications.

(3) The availability or exercise of the authority granted in subsection (a) may not be considered by the Secretary of the Interior in making a determination pursuant to this Act or other applicable law as to whether or not any proposed exchange is in the public interest.

(d) TERMINATION.—The authority specified in subsection (a) shall expire either (1) on December 31, 1990, or (2) when the Court order (or subsequent modification or continuation thereof) specified in subsection (a) is no longer in effect, whichever occurs first.

2. Amend the title so as to read:

A bill entitled the "Federal Land Exchange Facilitation Act of 1988".

Purpose of the Measure

The purpose of H.R. 1860, as ordered reported, is to facilitate and expedite land exchanges between the Forest Service or Bureau of Land Management and other parties by streamlining and improving the procedures for such exchanges and by authorizing additional funding.

Background and Need

Land ownership patterns in the western United States, and to a lesser degree in the eastern part of the Nation, are the result of numerous laws which were enacted in the 19th and 20th centuries to govern the disposal of Federal lands from the public domain and the Federal acquisition of lands or interests in land through the Nation. Although these laws have generally served their intended purposes, they have also resulted in land ownership patterns, particularly in the Western States, that are often complex and, in some instances, in need of adjustment to promote more efficient land management and to serve other important public and private objectives. The problems are most extensive on lands managed by the Secretary of the Interior and the Secretary of Agriculture.

For example, the "checkerboard" patterns of alternative section land ownership that resulted from the railroad land grants and statehood acts of the late 19th and early 20th centuries have sometimes made it very difficult for the Federal Government, States, and corporate and private landowners to efficiently manage their lands. These patterns have had an impact of access, the viability of timber, mineral, and grazing operations, and the protection of land for conservation purposes. Likewise, numerous "inholdings" in tracts of Federal, State and, to a less degree, private lands created as a result of the mining, homestead, and other laws have sometimes frustrated efforts to manage lands for purposes of community expansion, resource and recreation development, wildlife habitat protection and conservation.

In recognition of the ever-changing need to adjust land ownership patterns to accommodate public and private needs, Congress has on numerous occasions enacted legislation to promote land acquisition and disposal by the Federal Government through purchase, sale, condemnation, donation and land exchange. Land exchanges can be an especially important land ownership adjustment tool in certain situations because they do not generally require significant cash outlays, they can avoid some of the acrimony and prolonged disputes that can accompany domain or purchase transactions, and because they have the advantage of offering all parties involved compensation in land in cases where cash might not be an attractive substitute.

To authorize and facilitate land exchanges over the years, Congress has enacted numerous laws. While these laws have generally served quite well to promote land exchanges between the Federal Government and the State and/or private sector, the Committee believes there is, nevertheless, room for improvement; particularly with respect to streamlining exchange procedures, accelerating ex-

change timetables and establishing rules and regulations that are more uniform and consistent from agency to agency.

However, the Committee emphasizes that nothing in H.R. 1860 as ordered reported is intended to change the basic principles and ground rules of existing law governing land exchanges. In particular, the well-established principle that land exchanges are "willing-buyer and willing-seller" transactions which must be in the public interest would remain unaltered.

Summary of Major Provisions

The bill addresses a number of aspects of land-exchange procedures, including the following major areas of concern.

Land Appraisals.—With regard to the appraisal of lands involved in exchanges, H.R. 1860 does two main things. First, it requires that within 90 days of reaching an agreement to initiate a land exchange, the Secretary concerned will make arrangements with the State and/or private party or parties to be involved in the exchange for an appraisal. As under current law, any such appraisal arrangement will be established through negotiations between or among the parties, and H.R. 1860 makes no judgment as to who should perform the appraisals, how long they should take, who should pay for them, etc. The Committee also wishes to stress that by using the words "agreement to initiate an exchange" there is no implication implied that the Secretary concerned or any other party is bound to pursue that exchange to consummation.

The second key provision of H.R. 1860 concerning appraisals is that the bill establishes a conflict resolution mechanism for appraisal disputes that last for more than 6 months. More precisely, where an appraisal is completed and submitted for approval to the appropriate Federal review officer or agency, and no agreement on the appraisal is reached within 6 months, H.R. 1860 provides for immediate conflict resolution. Under the bill, as reported, the appraised values of lands in dispute are to be settled by arbitrations conducted in accordance with the Real Estate Valuation Arbitration Rules of the American Arbitration Association (AAA) by an arbitrator selected by the Secretary from names provided by the AAA. If the parties mutually agree that the AAA process is too cumbersome they may forgo arbitration by the AAA and mutually agree to substitute bargaining or some other conflict resolution process to determine land values.

It should be stressed that the arbitration or other conflict resolution mechanisms of H.R. 1860 are limited to establishing the values for the tracts of land involved. H.R. 1860 specifically provides that even after conclusive determination of land values, either party may elect to terminate the exchange, or the parties may modify the exchange proposal.

Rules and Regulations.—Another frequent complaint with current land exchange procedures is that the existing rules, regulations and policies governing exchanges can vary widely from agency to agency. Not only can this be confusing for landowners who may want to exchange different lands with several agencies, but it can also complicate an individual exchange where more than one agency is involved. Further, it has been noted that agency ap-

praisal standards can vary considerably, and that the current overall Federal appraisal guidelines, the Uniform Appraisal Standards for Federal Land acquisitions, govern only the acquisition, and not the disposal, of land by the Federal Government.

To address these problems and to provide for more uniform regulations and appraisal standards for agencies under the jurisdiction of the Secretaries of the Interior and Agriculture, H.R. 1860 would require the promulgation of comprehensive new rules and regulations governing land exchange policies and procedures and appraisal standards. It is the Committee's intent that such new rules and regulations be made as uniform and consistent as possible from agency to agency and that, wherever possible, joint rules, regulations and policies be promulgated. Of course, the Committee recognizes that the separate laws which govern BLM, the Forest Service, and other agencies may preclude the promulgation of identical rules and regulations, but every effort should be made to maximize uniformity.

Costs Preparatory to Land Exchanges.—In virtually any land exchange between the Federal Government and another party, substantial costs are incurred by all parties to prepare the land involved for exchange. Such costs include survey work of all kinds, archaeological survey and salvage, preparation of required environmental impact studies, mineral examinations, the removal of encumbrances to clear title, etc.

In recognition of this fact, H.R. 1860 would give the Secretaries of Agriculture and Interior discretionary authority to make appropriate adjustments in the exchange transaction to compensate a party for all or part of the costs assumed on behalf of another party (where the assuming party would not ordinarily be responsible for bearing such costs). In essence, the provision would allow the Secretary or the private party to use land, instead of cash, to pay for such costs. The report of the House Committee on Interior and Insular Affairs accompanying H.R. 1860 (House Report 100-165, Part 1) provides several brief case studies of how this provision might work.

The Committee stresses that this language does not give the Secretary the authority to adjust the appraisal of a particular piece of property or to lower or raise the amount represented as the fair market value of a parcel of land. Rather the Committee believes the authority to recognize such costs will give the Secretaries concerned far greater flexibility to pursue creatively meritorious land exchanges.

"Small Tracts" Exchanges.—In 1983, Congress enacted the so-called "Small Tract Acts" (Public Law 97-465, 16 U.S.C. 521c-521i) which, among other things, allowed the Forest Service to exchange certain small tracts of land of "approximate equal value" without a formal appraisal, where the land value was $150,000 or less and where the exchange was determined to be in the public interest.

H.R. 1860 would expand this principle of the Small Tracts Act to all land exchanges involving the Secretaries of Agriculture and the Interior, where (1) the value of the lands to be disposed of by the Secretary is $150,000 or less; (2) where the determination of "approximate equal value" is based on a documented and approved certification by a qualified appraiser; and (3) where the determina-

tion is made in accordance with established regulation and justified on a case-by-case basis. The regulations adopted to implement these provisions should generally follow the Small Tracts Act regulations and policies. Of course, even with the simplified procedures, smaller land exchanges will still have to comply with all requirements of applicable law, including any necessary review under the National Environmental Policy Act of 1969, the National Forest Management Act or other applicable law.

Land Exchange Funding.—To further encourage and facilitate land exchanges, H.R. 1860 authorizes the appropriation of up to $4 million annually in fiscal year 1989–1998 to be utilized by the Secretaries of Agriculture and Interior to support land exchange efforts and programs. The Committee has no particular preference as to how this authorization should be expended, but stresses that the $4 million is intended to be an addition to the existing land exchange programs and budgets for the Secretaries of Agriculture and Interior, to be utilized where most needed (as determined by the Secretaries).

National Wildlife Federation v. *Robert F. Burford.*—H.R. 1860, as amended by the Committee, also provides temporary authority to the Secretary of the Interior to proceed with land exchanges when the sole impediment to consummating the exchange is the pending lawsuit by the National Wildlife Federation in the United States District Court for the District of Columbia (Civil Action No. 85–2238). Exchanges which meet the requirement of these provisions may proceed notwithstanding any order in the suit.

Legislative History

H.R. 1860 passed the House of Representatives on December 14, 1987. A hearing was conducted by the Subcommittee on Public Lands, National Parks and Forests on March 14, 1987.

At the business meeting on May 11, 1988, the Senate Committee on Energy and Natural Resources ordered H.R. 1860, as amended, favorably reported.

Committee Recommendations and Tabulation of Votes

The Senate Committee on Energy and Natural Resources, in open business session on May 11, 1988, by unanimous vote of a quorum present, recommends that the Senate pass H.R. 1860 if amended, as described herein.

The rollcall vote on reporting the measure was 18 yeas, 0 nays, as follows:

YEAS	NAYS
Mr. Johnston	
Mr. Bumpers	
Mr. Ford	
Mr. Metzenbaum	
Mr. Bradley	
Mr. Bingaman	
Mr. Wirth	
Mr. Fowler	
Mr. Conrad	

Mr. McClure
Mr. Hatfield*
Mr. Weicker
Mr. Domenici*
Mr. Wallop*
Mr. Murkowski*
Mr. Nickles
Mr. Hecht
Mr. Evans

*Indicates voted by proxy.

COMMITTEE AMENDMENTS

During the consideration of H.R. 1860, the Committee adopted numerous technical, conforming and substantive amendments. The Committee further agreed to incorporate these amendments into a substitute text. The substantive changes are noted in the "Section-by-Section Analysis" portion of this report.

SECTION-BY-SECTION ANALYSIS

SHORT TITLE

Section 1 provides a short title, namely the "Federal Land Exchange Facilitation Act of 1988".

FINDINGS AND PURPOSES

Section 2 establishes certain Congressional findings and outlines the purposes of the bill.

The findings and purposes are self-explanatory and the Committee amendment made no significant changes from the House-passed bill. Some of the language referring to deadlines, timetables, etc. was deleted consistent with the Committee's view that exchange negotiations remain a voluntary activity entered into by two willing parties seeking a result beneficial to both.

FLPMA AMENDMENTS

Section 3(a) would amend the Federal Land Policy and Management Act of 1976 (FLPMA) by adding six new subsections to section 206 of that Act:

First new subsection

The first new subsection (new subsection 206(d)) to be added to section 206 of FLPMA would require the Secretary of Agriculture and the Secretary of the Interior to promulgate regulations establishing certain timeframes.

The first timeframe would be for arranging for an appraisal of property being considered for exchange; such arrangements would have to be made no later than 90 days after the Secretary concerned enters into an agreement to initiate an exchange with another party, unless prior to such 90 day period there is mutual agreement to proceed otherwise.

The second timeframe would fall 180 days after the appraiser has submitted an appraisal for review and approval by the relevant Secretary. If that time arrives without a prior agreement by the

relevant Secretary and the other party or parties either that the appraisal is acceptable, or that normal procedures be waived, then the appraisal is to be submitted to arbitration under the rules of the American Arbitration Association, with the results of such an arbitration being binding so far as concerns the value of the lands which were the subject to the appraisal for not to exceed 2 years. The section also provides that the Secretary concerned and the other party or parties, by mutual agreement, could suspend or modify the second or third deadline or the arbitration requirements themselves.

The third timeframe would fall 30 days after the completion of an arbitration. That would be the deadline for the Secretary and the other party or parties to determine whether to proceed with the exchange, modify the exchange, or terminate the exchange. Either side could unilaterally decide to terminate the exchange, so long as this deadline for a decision is met.

The Committee made two substantive changes in this section as passed the House. First it included language to address a concern raised by the Justice Department regarding the Appointments Clause and the arbitration provisions. The Committee amendment provides that the Secretary is authorized to select an arbitrator from recommendations submitted by the AAA. It is the intent of the Committee that the Secretary be provided with several names from which to choose.

The Committee also included a 2-year outside limit on the length of time that the land values established pursuant to arbitration will be binding.

Second new subsection

The second new subsection (new subsection 206(e)) to be added to section 206 of FLPMA would provide that all patents or titles to lands involved on both sides of an exchange would be issued simultaneously, unless the parties to an exchange should mutually agree otherwise, once the concerned Secretary has taken whatever steps might be necessary to assure that the United States would receive acceptable title to land being acquired.

Third new subsection

The third new subsection (new subsection 206(f)) to be added to section 206 of FLPMA would require that regulations governing exchanges be promulgated by the Secretary of the Interior and the Secretary of Agriculture within 1 year after the enactment of this bill. These regulations are to reflect national appraisal standards, and also are to permit the relevant Secretary to adjust the involved in order to reflect the costs, time, and other factors necessary to bring the lands involved in an exchange to their highest and best use for appraisal and exchange purposes. (Examples of such costs would include surveys, mineral examinations, archaeological surveys, and the like.)

The Committee amendment makes numerous technical, conforming, and drafting changes in this new subsection. With regard to the requirements that the new regulations reflect national appraisal standards, the Committee believes that the new regulations should address appraisal problems arising out of Federal land dis-

posal as well as Federal land acquisition. In the determination of equal value, both Federal and non-Federal parties should be treated fairly and equally. Established appraisal policies should not unfairly affect either the Federal or non-Federal landowner simply because the lands are being acquired or diposed by the Federal Government.

The Committee also recognizes that the provision permitting the Secretary to take into account costs assumed by the other party to exchange in determining the values of the exchange transaction should in no way be construed as permitting the Secretary to adjust the price or value of the land itself. The Committee amendments included languae in this regard requiring the Secretary to determine that such adjustments be in the public interest and that any such "credit" given for assuring that costs accurately reflect the value of such costs or services.

Fourth new subsection

The fourth new subsection (new subsection 206(g)) which the bill would add to section 206 of FLPMA would provide that until the new rules and regulations required by the third new subsection are in place, land exchanges may proceed in accordance with existing laws and regulations.

Fifth new subsection

The fifth new subsection (new subsection 206(h)) which the bill would add to section 206 of FLPMA would address cases in which the combined value of one or more parcels of land (or interests therein) being considered for transfer out of Federal ownership in a single exchange is no more than $150,000. In such a case, under the provisions of this new subsection, the Secretary concerned could exchange such lands and interests for lands and interests of approximately (as opposed to exactly) equal value, provided that the Secretary finds that a determination of approximate equal value can be made without a formal appraisal (as based on a documented and approved certification by a qualified appraiser). Such procedure would have to be in accordance with established regulations and the Secretary concerned would be required to document how the requisite determination was made.

Sixth new subsection

The sixth new subsection (subsection (i)) which the bill would add to section 206 of FLPMA would address segregation of land involved in an exchange.

Paragraph (1) would authorize the Secretary of the Interior to temporarily segregate from the operation of the mining laws Federal lands being considered for transfer to another party as part of an exchange. In cases involving lands managed by another Secretary, this would be done at such other Secretary's request. Such a temporary segregation could be for any period, up to 5 years, as might be appropriate. Such a segregation would be subject to valid existing rights and would terminate if there were a decision not to proceed with the contemplated exchange with regard to segregated land (or, if the exchange proposal should be modified so as to delete

from further consideration some portion of the segregated land, termination would occur upon the deletion of such portion).

Paragraph (2) would automatically and by operation of law segregate from the operation of the public land laws (including the mining laws) lands acquired by the United States though an exchange consummated under FLPMA or (with respect to land managed by the Secretary of Agriculture) other law. Such segregation would end 90 days after the United States' acceptance of title to the acquired lands and after such period, the Public land laws, including the mining laws, would apply to such acquired land to the extent that would be the case should no case segregation have occurred.

It should be stressed that nothing in this new subsection is intended to open—or to authorizing the opening—of any lands not otherwise open to operation of some or all of the public land laws, including the mining, mineral leasing, and geothermal leasing laws.

CONFORMING AMENDMENT

Section 3(b) is a conforming amendment to specify that the provisions of section 206(b) of FLPMA (including those allowing payment or receipt of equalization amounts in certain exchange cases) would be applicable to an exchange carried out by either the Secretary of the Interior or by the Secretary of Agriculture.

CONSERVATION AREAS

Section 3(c) would amend section 206(c) of FLPMA to eliminate the need for Secretarial actions to provide appropriate status for lands pursuant to an exchange within National Forests, National Parks, National Wildlife Refuges, or other Congressionally-established areas, by providing for their automatic inclusion and management as part of the appropriate area.

AUTHORIZATION

Section 4 is an authorization for appropriations to further land-exchange programs. This section would authorize an annual appropriation of up to $4 million for fiscal years 1989 through 1998, to be used jointly by the Interior and Agriculture Departments (or divided among the Departments as their respective Secretaries deem appropriate, such as through inter-agency teams of specialists) for purposes of considering, processing and consummating land exchanges. Monies appropriated pursuant to this authorization are to be in addition to (and not offset against) other funds annually requested by and appropriated for similar purposes.

SAVINGS CLAUSE

Section 5 provides that nothing in the bill is to be considered as amending the Alaska Lands Act or the Alaska Native Claims Settlement Act or as enlarging diminishing the authority that either of those Acts provides that the Forest Service or the Interior Department of with respect to exchanges. It also provides that if any provision of the bill (or application thereof) should be held invalid, the remainder of the bill would not be affected.

NATIONAL FOREST MANAGEMENT ACT

Section 6 would amend Section 17(b) of the NFMA by deleting $25,000 and inserting in lieu thereof $150,000.

OTHER NATIONAL FOREST CHANGES

Section 7 would expand the exchange authority of the Secretary of Agriculture under the Act of July 1956, which permits certain interchanges of lands between the Forest Service and the Department of Defense, to cover certain National Forest Service lands (such as the National Grasslands and Land Utilization lands) which are not now included in the 1956 interchange authority.

These additional lands are part of the National Forest System, and should fall within the purview of the 1956 law. Their inclusion should reduce the need for Congress to pass special legislation on a case-by-case basis for such interchanges in the future.

LAND INFORMATION STUDY

Section 8 provides for a study of the need for and costs and benefits that would come from improvements in existing methods of land surveying and mapping and of collecting, storing, retrieving, disseminating, and using information about Federal and other lands.

Subsection (a) would require the Secreary of the Interior to conduct such a study.

Subsection (b) specifies that in doing the study, the Secretary of the Interior would consult with the Secretary of Agriculture; the Secretary of Commerce (included because of the importance of having the views and advice of the Coast and Geodetic Survey); the Director of the National Science Foundation; representatives of State and local governments; and representatives of the private sector surveying and mapping science.

The Committee expects that each Federal agency will participate actively during the 1 year study so that each agency's expertise, perspective and recommendations will be taken into account in the final report prepared by the Secretary of the Interior.

Private sector organizations to be consulted during the study should include The American Congress on Surveying and Mapping and the American Society for Photogrammetry and Remote Sensing. These two professional and technical societies have played a major role in developing, coordinating and promoting land information systems since 1980 and could greatly assist the Secertary in preparing the study.

Subsection (c) would set a deadline of 1 year after the enactment of H.R. 1860 for the Secretary of the Interior to report to Congress about the results of the study mandated by this section.

Subsection (d) outlines a number of topics which would be required to be discussed in the report required by subsection (c).

Subsection (e) would authorize the Secretary of the Interior to include in the report required by the subsection (c) any recommendations for legislation as might seem necessary or desirable.

Section 9 was added as part of the Committee amendment. It permits, under certain conditions and limitations, the waiver of cash equalization payments to equalize the values of an exchange.

Section 10 was also added to the House-passed bill as part of the Committee amendment to H.R. 1860.

Section 10(a). This section provides the Secretary of the Interior with authority to revoke, modify or terminate part of all of a land withdrawal or classification, as may be necessary to deliver clear title to land involved in an exchange, when the sole impediment to the exchange is Civil Action No. 85–2238 (*NWF* v *Burford*).

(b) The authority in (a) may only be used where:

(1) the exchange proposed is carried pursuant to law authorizing such exchange

(2) the exchange is prepared in compliance with existing law

(3) the head of the Federal land agency managing the lands has submitted a statement of concurrence with the exchange

(4) 60 days notice has been provided in the Federal Register

(5) a report has been sent to Congress which includes:

(A) a justification for the exchange

(B) an explanation as to why the withdrawal or classification is no longer necessary

(C) assurances that relevant documents are available in the nearest office of the Secretary to the land exchanged and in Washington, and

(D) an explanation of the changed withdrawal or classification and the exchange on the objectives of the applicable land management plan.

(c) Contains three self-explanatory savings clauses.

(d) Provides that the authority of the amendment expires December 31, 1990 or when the court order is no longer effective whichever occurs first.

Cost and Budgetary Considerations

The following estimate of the cost of this measure has been provided by the Congressional Budget Office.

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May 18, 1988

Honorable J. Bennett Johnston, Jr.
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Congressional Budget Office has prepared the attached cost estimate for H.R. 1860, the Federal Land Exchange Facilitation Act of 1988.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

James L. Blum
Acting Director

cc: Honorable James A. McClure
Ranking Minority Member

CONGRESSIONAL BUDGET OFFICE

COST ESTIMATE

May 18, 1988

1. BILL NUMBER: H.R. 1860

2. BILL TITLE: Federal Land Exchange Facilitation Act of 1988

3. BILL STATUS:

As ordered reported by the Senate Committee on Energy and Natural Resources, May 11, 1988.

4. BILL PURPOSE:

H.R. 1860 would authorize the appropriation of up to $4 million annually from fiscal year 1989 through fiscal year 1998 to facilitate federal land exchanges.

The bill would require that within one year of the bill's enactment, the Secretary of Agriculture and the Secretary of the Interior promulgate new and comprehensive rules and regulations governing land exchanges that incorporate certain provisions and timetables for land appraisals and arbitration of appraisal disputes. The bill would provide for binding arbitration of appraisal disputes when land is being exchanged but would allow waivers of delays of the regulations' requirements upon mutual agreement of the parties involved in the exchange.

H.R. 1860 would also: require that within one year the Secretary of the Interior assess and report on the need for improving methods of data collecting regarding federal lands; provide for the simultaneous exchange of patents and titles of land involved in an exchange; modify the requirement that lands exchanged be of equal value to allow some small tracts to be exchanged for lands of approximately equal value; allow existing laws pertaining to land exchanges to remain in effect until the new regulations are promulgated; and under certain circumstances, allow for the temporary revocation of land withdrawals.

5. ESTIMATED COST TO THE FEDERAL GOVERNMENT:

(by fiscal year, in millions of dollars)

	1989	1990	1991	1992	1993
Authorization Level	4	4	4	4	4
Estimated Outlays	4	4	4	4	4

The costs of this bill fall within budget function 300.

CBO estimates that outlays totaling $20 million would be incurred from fiscal years 1994 through 1998, as a result of the authorization in this

bill. In addition, we estimate that the land information study authorized in the bill would cost approximately $250,000 in fiscal year 1989.

Basis of Estimate:

This estimate assumes that the full amounts authorized in the bill will be appropriated prior to the beginning of each fiscal year. Outlays are estimated based on information from the Department of Agriculture and the Department of the Interior.

6. ESTIMATED COST TO STATE AND LOCAL GOVERNMENTS: None.

7. ESTIMATE COMPARISON: None.

8. PREVIOUS CBO ESTIMATE:

On June 5, 1987, CBO prepared a similar cost estimate for H.R. 1860 as ordered reported by the House Committee on Interior and Insular Affairs on June 3, 1987.

9. ESTIMATE PREPARED BY: Theresa A. Gullo (226-2860)

10. ESTIMATE APPROVED BY:

for C.G. Nuckols
James L. Blum
Assistant Director
for Budget Analysis

Regulatory Impact Evaluation

In compliance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out H.R. 1860. The Act is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact of personal privacy.

Little, if any, additional paperwork would result from the enactment of H.R. 1860, as reported.

Executive Communications

The pertinent legislative reports received by the Committee from the Departments of the Interior Agriculture and Justice setting forth executive agency recommendations relating to H.R. 1860 is set forth below:

U.S. Department of the Interior,
Office of the Secretary,
Washington, DC, February 26, 1988.

Hon. J. Bennett Johnston,
Chairman, Committee on Energy and Natural Resources,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: This responds to your request for our views with H.R. 1860, an act entitled the "Federal Land Exchange Facilitation Act of 1987" as passed by the House of Representatives.

We support the concept of improved procedures for Federal land exchanges; however, we strongly oppose H.R. 1860 as currently drafted because it falls short of accomplishing this objective, and because it contains a provision that may be unconstitutional. If this legislation is enacted in its current form, we would be forced to recommend that the President not approve it. However, we submit for your consideration and support the enclosed substitute bill which we believe provides for procedures which will truly expedite the exchange process.

H.R. 1860 proposes to improve the efficiency by which the Federal Government accomplishes land exchanges. Specifically, it establishes timetables for steps in the exchange process, requires mandatory arbitration, provides survey authority to agencies other than the Department of the Interior, and modifies the current Federal appraisal process.

We have three major problems with H.R. 1860, as currently drafted. First, we believe the mandatory timetables set in the bill are unrealistic. A better approach is for the parties to agree to a schedule because time needed for each exchange varies depending on the complexity of the individual exchange.

Second, we oppose the mandatory arbitration provision in the bill. While it may be desirable in some situations to utilize arbitration, we do not believe it is necessary or should be required in all cases where disagreements exist as to value. Moreover, the Department of Justice has advised that compulsory mandatory arbitration

by non-Federal officials would violate the Appointments Clause of the Constitution.

Exchanges of federally owned lands are required to be made in the public interest. We believe that determination of the values of the lands or interests to be exchanged must remain with the appropriate Secretary or the other party involved in the exchange. We presently use a variety of conflict resolution mechanisms to accomplish this same result. These include third party appraisers, blue ribbon panels, and, if appropriate, some type of arbitration. Arbitration can be costly and time consuming.

Moreover, the time and expense of arbitration would be wasted if, after completion of the process, the parties decide not to go forward with the exchange as H.R. 1860 allows.

Finally, we object to the requirement that the regulations shall recognize that the parties in an exchange may agree that one party will assume, without compensation, all costs or other responsibilities or requirements ordinarily borne by the other party. "Costs and other responsibilities or requirements" is defined to include costs of land surveys and appraisals, mineral examinations, archeological surveys and salvage, title searches, removal of encumbrance, arbitration, curing deficiencies preventing highest and best use, compliance with laws, regulations and policies applicable to exchanges, and other similar costs. The parties may then agree to make adjustments to the relative values assigned to the properties in the exchange, to compensate a party for assuming costs or responsibilities ordinarily borne by the other party.

We do not believe that the various administrative costs listed in H.R. 1860 should be used to adjust relative values. Agencies are entrusted with responsibility for administering the public lands in accordance with laws passed to protect the public interest. Therefore, there is no justification for discounting the value of the public lands because they are in public ownership. The rights and interests conveyed have a market value which is not diminished by agency administrative costs. In addition, it would be extremely difficult to control administrative costs paid by the non-Federal party should these costs be reimbursable with additional lands. In practice, the proper amount of reimbursement could very well become an issue that would further prolong the land exchange process.

We are pleased to note the deletion of the provision that would authorize the Secretaries, having jurisdiction over lands involved in an exchange, to perform all necessary land surveys. Existing agreements between the Bureau of Land Management and the Forest Service allow the Forest Service to conduct surveys on those lands the Forest Service does not already have the authority to survey. Legislation is not needed to accomplish that. However, only one agency can maintain a public land record system. The end result of a survey goes into the record system but approval of necessity must be by only one agency to assure consistency in the system. Filing a survey is not sufficient. The Bureau of Land Management could not defend in the courts a survey that has merely been filed with it; it must approve it to assure that it meets standards the Bureau can defend.

We have no objection to the new section 8 that was added to the bill. However, we believe it is unnecessary because we are presently conducting a study which would accomplish the same result.

The enclosed substitute bill addresses these concerns and provides additional authorities which will truly expedite the exchange process.

First, the bill would authorize exchanges of Federal lands of not more than $150,000 to be made for approximately equal value without formal appraisals as long as the exchange is based on documented certification by a qualified appraiser. In addition, it would permit exchanges of land of not more than $500,000 in value or 5,000 acres to be made at approximately equal value without any cash equalization. The differential can be no more than 3 percent of the value of the Federal lands.

This provision will minimize the conflicts which arise in attempting to establish equal values. It will eliminate the necessity for making significant cash payments to equalize values in smaller exchange situations, while still protecting the public interest.

Second, the bill would authorized the appropriate Secretary to use a variety of voluntary approaches to resolve disputes as to land values including fact-finding non-binding arbitration and mediation. This gives flexibility to negotiate values while not subjecting the parties to unnecessary mandatory requirements which would be unconstitutional.

In addition, our substitute draft bill addresses several matters both included and not covered in H.R. 1860, such as a finite time for opening lands to the operation of the mining laws, including the mineral and geothermal leasing laws, a provision allowing for simultaneously executed documents of conveyance to be held in escrow where necessary, and several provisions allowing for expedited exchanges by the Forest Service. These include the following provisions. First, the bill would amend the National Forest Management Act of 1976 to increase the congressional oversight of exchanges from $25,000 to $250,000. Section 17(b) of the National Forest Management Act of 1976 (NFMA) now requires 30-day oversight by the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry for all Forest Service land purchases and exchanges; under the Weeks Act of 1911 and related acts which are valued at $25,000 must be reviewed at the National Forest, Region, and Washington levels. In our judgment, the $25,000 limit is unnecessarily low. By agreement with the House Committee on Agriculture, Forest Service land acquisitions under other authorities are not reviewed by the House Committee unless their value exceeds $250,000.

Another provision of both the substitute bill and H.R. 1860 would amend the Act of July 29, 1956, which authorizes interchanges of national forest lands and lands under control of a military department. Thee are some mutually beneficial interchanges that cannot be accomplished under present authority, because the Forest Service administered lands or waters proposed for transfer to a military department are not technically "national forests" (e.g., National Grasslands and land utilization projects administered by the Forest Service as part of the National Forest System). H.R. 1860 and the substitute will would make a technical amendment in the 1956 Act

whereby "national forest" would be changes to "National Forest System." The "National Forest System" is defined by section 11(a) of the "Forest and Rangeland Renewable Resources Planning Act of 1974."

The Substitute bill would, finally, amend the Act of December 4, 1967, to further improve the land exchange process and management of the National Forest System. First, the Act of December 4, 2967, as amended (commonly known as the Sisk Act) contains special provisions with respect to national forest land exchanges with State, county, or municipal governments, or public school districts or other public school authorities. If the government entity or public school authority does not have sufficient land to offer, the exchange may be completed through a cash payment for a portion or all of the selected Federal land. These payments go into a special Treasury fund that is available when appropriated for acquisition of replacement land in the same State as the Federal lands in the exchange. The Sisk Act limits all such conveyances to a maximum of 80 acres to any one entity. Conveyances to government entities are restricted to lands being utilized by such entities on January 12, 1983, and require the same use to be made of the land in the future.

The proposed amendment to the Sisk Act would greatly facilitate mutually desirable land exchanges within the National Forest System. The scope of the Act would be expanded to include exchanges with individuals as well as government entities and public school authorities. Exchanges to individuals would be subject to congressional oversight.

A desirable effect of this change would be to permit the conveyance of land, which has lost its National Forest character, if the Secretary determines that such a conveyance was in the best interest of the United States. The 80-acre limitation would remain. Cash payments placed in the special Treasury fund would be available for appropriation for the acquisition of replacement lands in the same State.

We believe this substitute bill will improve Federal exchange procedures without the attendant problems and time-consuming procedures found in H.R. 1860. Therefore, we urge its adoption rather than the current proposal before the Committee.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely

J. STEVEN GRILES,
Assistant Secretary.

Enclosure.

A BILL To expedite exchanges by the Federal Government and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Land Exchange Act of 1987."

SEC. 2. (a) The Congress declares that it is the policy of the United States that land exchanges should be used by Federal land managers wherever possible to consolidate Federal, State, and pri-

vate holdings of land or interests in land in order to achieve more efficient management for important objectives including the protection of fish and wildlife habitat and aesthetic values, the enhancement of recreation opportunities, the consolidation of mineral and timber holdings for more logical and efficient development, the expansion of communities, the promotion of multiple-use values, and fulfillment of public needs.

(b) The major purposes of this Act are to grant authority to the Secretary of the Interior and Agriculture to:

(1) facilitate and expedite land exchanges pursuant to the Federal Land Policy and Management Act of 1976 and other laws applicable to exchanges by the Secretaries of the Interior and Agriculture; and

(2) provide for voluntary approaches to resolve differences between the parties as to the values of lands or interests in lands being considered for exchange.

SEC. 3. The first sentence of section 206(b) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716(b)) is hereby amended to insert the word "concerned" after the words "the Secretary."

SEC. 4. (a) Section 206(c) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716(c)) is hereby amended to read as follows:

"Lands acquired by the Secretary by exchange under this section which are within the boundaries of the National Forest System, the National Park, Wildlife Refuges, Wild and Scenic Rivers, Wilderness, Trails, or any other System established by Act of Congress shall, upon acceptance of title, immediately become a part of the System for which they were acquired, without further action by the Secretary, and shall be subject to all the laws, rules and regulations applicable to the System of which they have become a part."

(b) Section 206 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716 is amended by adding subsections (d) through (g) as follows:

"(d) Notwithstanding the provisions of subsection (b) of this section and other applicable laws which require that exchanges of lands or interests therein be for equal value, where the Secretary concerned determines it is in the public interest and that the consummation of a particular exchange will be expedited thereby, the Secretary concerned may exchange lands or interests therein which are of approximately equal value in cases where—

"(A) the combined value of the lands or interests therein to be transferred from Federal ownership by the Secretary concerned in such exchange is not more than $150,000; and,

"(B) the Secretary concerned finds that a determination of approximately equal value can be made without formal appraisals, and is based on a documented certification by a qualified appraiser approved by an authorized officer.

"(e) Notwithstanding the provisions of subsection (b) of this section, in exchanges where the Federal lands being exchanged do not exceed 5,000 acres of $500,000 in value, the Secretary of the Interior or the Secretary of Agriculture may exchange lands and interests in lands that are of approximately equal value, without requir-

ing cash equalization, when the public benefits to be derived justify consummation of an exchange. In making exchanges pursuant to this subsection, the appropriate Secretary shall: (i) identify the public benefits to be derived; (ii) document the scope and quality of those public benefits; (iii) determine the potential cost savings to the government from the exchange and from each of the public benefits; and (iv) limit the differential in approximate values to no more than 3 per centum of the total dollar value of the Federal lands or interests in land being exchanged. The Secretary concerned shall try to reduce the differential to as small an amount as reasonably possible.

"(f) Federal lands or interests in lands proposed for exchange pursuant to this Act shall be segregated for a period of 2 years from all forms of appropriation under the public land laws including the mining, mineral leasing and geothermal steam laws, upon the publication of a notice in the Federal Register. The Secretary is hereby authorized to extend the segregation one time for a period of not to exceed 2 years. After the expiration of the period of segregation, Federal lands not conveyed in the proposed exchange shall be automatically restored to the status that existed prior to segregation and open to operation of the public land laws including the mining, mineral leasing, and geothermal leasing laws.

"(g) Non-Federal lands or interests in lands acquired pursuant to this section, except those within the boundaries of units of a national system described in subsection (c) of this section, shall be opened automatically to the operation of all the public land laws, including the mining, mineral leasing and geothermal steam laws, at 12 o'clock noon on the 181st day the Secretary publishes in the Federal Register an order maintaining the enclosure in part and describing any limitations on use of the lands that are opened."

SEC. 5. Section 208 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1718), is amended by designating the existing paragraph as subsection (a) and adding a new subsection (b) to read as follows:

"(b) All documents conveying lands and interests therein pursuant to this Act shall be issued and exchanged simultaneously unless the parties mutually agree otherwise. Where necessary the documents of conveyance shall be placed in escrow pending title search of lands being acquired by the Federal Government, to be conducted by the appropriate Secretary, to assure that the United States is acquiring clear title. In the event that the appropriate Secretary finds that the title to the property to be conveyed to the United States is not acceptable, the conveyance documents placed in escrow shall be returned to the originators and the Secretary or his designee is authorized to cancel the United States document of conveyance."

SEC. 6. In the resolution of disputes concerning value between the exchange proponent and the Secretary having management responsibility for the land, the Secretary shall consider cooperative, voluntary approaches for resolving disputes of value including, but not limited to, fact finding, nonbinding arbitration, mediation or other conflict resolution procedures which would facilitate agreement within a mutually agreed time.

SEC. 7. Section 17(b) of the National Forest Management Act of 1976 is hereby amended by deleting "$25,000" and inserting in lieu thereof "$250,000".

SEC. 8. The Act of July 26, 1956 (70 Stat. 656, 16 U.S.C. 505a, 505b) is hereby amended as follows:

(a) The words "national forest lands" are hereby deleted wherever they occur, and the words "National Forest System lands" are inserted in lieu thereof.

(b) The words "a national forest" are hereby deleted in the first paragraph, and the words "a unit of the National Forest System" are inserted in lieu thereof.

(c) The following sentence is hereby added at the end of the second paragraph: "Lands interchanged under the authority of the Act shall be deemed to include interest in lands.".

SEC. 9. The Act of December 4, 1967 (81 Stat. 531, as amended; 16 U.S.C. 484a) is amended as follows:

(a) The words "or individual" are hereby inserted after the words "school authority" whenever they appear.

(b) The following paragraph is inserted after the second paragraph: "In addition, the Secretary of Agriculture, in exchanges under this authority involving individuals, may utilize covered funds upon deposit when appropriated, to acquire replacement National Forest System lands or interests in lands. Exchanges under this authority involving individuals shall be limited to conveyance and acquisition of national forests or national forest purchase unit lands.

SEC. 10. Nothing in this Act shall be deemed to amend the Alaska Native Claims Settlement Act (43 U.S.C. 1601) or the Alaska National Interests Lands Conservation Act (16 U.S.C. 3101).

SEC. 11. If any provision of this Act or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby.

IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

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SENATE COMMITTEE ON
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Honorable J. Bennett Johnston
Chairman, Committee on Energy and
Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

At the March 14, 1988, hearing before the Committee on Energy and Natural Resources on H.R. 1860, an Act entitled the "Federal Land Exchange Facilitation Act of 1987", I was asked to expand on the three major objections to the Act that formed the basis of our objections to it.

Our overall comment on this Act is that it addresses an issue that is a nonproblem. Exchanges involving lands administered by the Bureau of Land Management (BLM) that are in the public interest are completed as expeditiously as possible. Whether an exchange is in the public interest is spelled out in section 206(a) of the Federal Land Policy and Management Act of 1976 (FLPMA) - that full consideration is given "to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife, and the Secretary concerned finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired."

Exchanges of public lands may not be pursued as expeditiously as some proponents may wish because technical problems arise or there are budgetary problems, or the proposal as made generates a determination by the Secretary that the public interest as delineated in FLPMA will not be served. Nothing in H.R. 1860, or the proposed amendment to it, will expedite resolution of matters of that nature. As I suggested at the hearing, the proposal which we prepared does contain provisions which will expedite exchanges and does not include the provisions of H.R. 1860 which we believe will in fact delay exchanges.

Our first problem is the unrealistic timetables contained in the bill and the fact that they do not recognize that exchanges, for a variety of reasons, require flexibility in timing. H.R. 1860 does not allow that. For instance, section 3 would add a new subsection (d)(1) to section 206 of the Federal Land Policy and Management Act to require that the Secretary promulgate regulations providing that unless it is mutually agreed otherwise prior to the expiration of 90 days after entering an "agreement to initiate an exchange" of land, the Secretary and other parties involved in an exchange, no later than 90 days after entering into such agreement, shall "arrange for an appraisal", to be completed within a timeframe negotiated by the parties. In other words, if within 90 days after entering into an agreement to initiate an exchange, the Secretary believes more than 90 days are necessary to arrange for an appraisal, but the other parties do not agree, then there is no mutual agreement and everyone, including the Secretary, is forced to arrange for the completion of an appraisal within a negotiated timeframe. What if such a timeframe cannot be negotiated, or what if different appraisal arrangements are made by different parties? Who can bind whom? Basically what this clause does is require "up-front" negotiation and concurrence as to the appraisal arrangements before an agreement to initiate an exchange is made.

And, in that regard, when would the parties be considered to have "entered into an agreement to initiate an exchange"? There are no requirements of law that the first step in an exchange be an agreement. As a matter of fact, most exchanges are not committed to formal written agreements to be performed in the future (executory agreements), but nonbinding letters of present intent are encouraged. Negotiation, publication in the Federal Register of a notice of initiation of an exchange proposal, analyses, formal clearances, reports, inventories, and compliance with the National Environmental Policy Act (NEPA) and other laws all take place, normally, without any contractual assurance that ultimately an exchange will be consummated.

Another imprecise phrase is "arrange for appraisal". This could mean an agreement to schedule an appraisal, a contract for a private appraisal, or a requirement for a final appraisal to be completed. Timing of an appraisal should not be a matter of law because of the uncertainty of elements such as scheduling of the work, accessibility in high elevations, timber cruises, soil surveys, land reports, archeological investigations and similar actions that must precede the start of an appraisal.

Our second major problem with H.R. 1860 relates to new subsection (d)(2) to be added to section 206 of FLPMA. This would require that if within 180 days after submission of an appraisal to the Secretary for review and approval, the Secretary and the other party cannot agree to accept the appraisal, it shall be submitted to arbitration under the rules of the American Arbitration Association. The Secretary is given no leeway. The provision does not say the Secretary can withdraw from the exchange at this point. It says he shall submit the appraisal to compulsory arbitration. Under the language of this section it is possible that the Secretary could be sued if he decides to terminate the exchange at this point rather than submit to compulsory arbitration. This provision is not made less objectionable because a later

provision allows the parties to agree to modify the procedures. The problem arises when the parties do not agree for any number of reasons - the most basic one being that the exchange is not in the public interest as defined, or that there is no Federal need for the land being offered to the Federal Government or that the exchange would have an adverse impact on an ongoing Federal program. The Secretary is bound by the time requirements of H.R. 1860. When the parties to a proposed exchange do not agree on the basic issues in the exchange, we know of no basis or justification for forcing the Secretary, or even the other party, into something they do not agree on and into procedures and timetables that may never be needed.

The Justice Department has advised us that it believes compulsory arbitration is unconstitutional because it violates the Appointments Clause. The Justice Department will soon submit a formal statement on this point. In the interim, putting the matter into nonlegal terms, our understanding of the problem is that compulsory arbitration removes from the Secretary the authority to make the decision as to the value of the land. He is bound by the arbitrator's decision as to that value. Even though the Secretary may terminate the exchange if he doesn't like the appraisal, that doesn't release him from being bound by the appraisal as to the value of the land. The Appointments Clause of the Constitution requires that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States" and must be appointed by the President, the heads of Departments or a court of law. Determination of the value of Federal property is significant authority so that whoever does it must be appointed as an "Officer of the United States." Arbitrators under H.R. 1860 would apparently be appointed in conformity with the American Arbitration Society rather than the Appointments Clause.

An additional problem with this provision is that either party can terminate the exchange after going through compulsory arbitration. Proceedings under the American Arbitration Association are time consuming and expensive. If the parties terminate the agreement after the appraisal is made, the time and money spent on it are a waste. The Federal Government should have the option of pursuing a procedure where it is prudent to do so and should not be forced into it when it is not prudent.

We object to the provisions of new section (f)(2)(A) to be added to section 206 of FLPMA that appraisals shall "adequately reflect any differences that may exist between appraising lands or interests therein being acquired by the Federal Government and appraising lands or interests therein being transferred out of Federal ownership." The same standards are used for appraising Federal lands as non-Federal lands involved in an exchange. There is no cause or basis for assuming that there are differences in appraisal practices. It is important to dispel misconceptions that are sometimes stated about the appraisal process. These include that there is a difference in appraisal procedures between Federal and non-Federal lands; that the highest and best use of the Federal lands may be overstated and that of the non-Federal lands understated; that the Federal lands are not as marketable as the non-Federal lands involved in an exchange proposal; that the non-Federal parties to exchanges may not be treated fairly. These provisions could also imply that

the non-Federal lands to be acquired in an exchange should be valued under condemnation appraisal standards while the public lands to be transferred in an exchange should be valued under a less rigid disposal standard. Again, since exchanges are entirely voluntary on the part of all parties, the standards of appraisal should be and are the same for both the lands to be acquired and the lands to be transferred.

Our third problem with H.R. 1860 is found in the language of section (f)(2)(B)(ii) to be added to section 206 of FLPMA which permits the Secretary "to make adjustments in the relative values assigned to properties involved in an exchange in order to compensate a party to the exchange for assuming costs or other responsibilities ordinarily borne by the other party."

Land values should not be adjusted. Those values are determined by the use of appropriate appraisal techniques. No matter who handles administrative costs associated with an exchange, that should not cause an adjustment in land values. If extrinsic cost factors are introduced into the value of the land, there is no longer a land for land transaction. It begins to have the characteristics of a sale and not a true land for land exchange.

Giving additional land to a proponent that assumes administrative costs normally borne by the other party to an exchange has many shortcomings. It cuts Congress out of its appropriation role. It interferes with the President's ability to comply with the President's budgetary responsibilities. It sets up a procedure under which the Federal Government would have no control over the cost of administrative procedures. Land is as much an asset as money and it should not be traded without controls. These provisions may result in lower priority exchanges being given a higher priority than more important exchanges where public interest determinations may be affected.

As a matter of practice, in most cases BLM pays administrative costs. Occasionally a proponent of an exchange will offer to perform the administrative tasks and absorb the costs in the interest of accelerating an exchange. The proponent should not be compensated for this by being given additional Federal land.

We are not certain what type of agreement between the United States and the proponent of an exchange would be necessary to protect the Federal Government if this provision were enacted, or what kind of accounting for dollars spent in this manner would have to be reported to Congress.

This provision also raises the question as to whether the United States would be responsible for compensating a proponent for administrative services performed by the proponent if the United States later withdraws from the exchange.

In summary, as I have said repeatedly, none of these provisions will expedite exchanges, the professed purpose of H.R. 1860. As a matter of fact they will slow and delay exchanges.

The draft bill that was attached to my statement adopts the best features of H.R. 1860 and I urge its adoption. However, at your request we will attempt to revise H.R. 1860 and prepare language that will eliminate our problems. I will send that to you as soon as it is prepared.

Although at the hearing no mention was made and no questions were asked about a provision we understand may be offered as an amendment to H.R. 1860 to exclude exchanges from the National Wildlife Association lawsuit, we have been given a copy of that proposal and have enclosed a brief summary of our problems with it and objections to it. (See enclosure 1) We urge that the amendment not be adopted.

At the hearing there was some discussion of what is meant by "a documented certification made by a qualified appraiser" and how that differs from a standard appraisal. We have enclosed a statement of the differences between those two concepts which shows how the documented certification can save a considerable amount of time and yet establish fair market value. (See enclosure 2)

We have also enclosed for your information a side-by-side chart that shows steps in the exchange process that are required by the laws that authorize Forest Service exchanges but do not apply to BLM. Each of these steps has the effect of delaying the exchange process. We believe changes in those laws are the only changes needed to accelerate the present exchange process. (See enclosure 3)

The two new, innovative proposals for additional exchange authority contained in our proposed bill that would add new subsections (d) through (g) to section 206 of the Federal Land Policy and Management Act of 1976 would also accelerate land exchanges and we urge their adoption.

This Department would recommend that the President veto this bill if enacted in its current form for the reasons stated above.

I appreciate your interest in BLM and your efforts to improve the exchange process. We will be happy to work with you to develop a good bill.

The Office of Management and Budget has advised that the enactment of H.R. 1860 as currently drafted would not be in accord with the program of the President.

Sincerely,

Robert J. Burford

Director

Enclosures

[Enclosure 1]

COMMENTS ON AMENDMENT TO EXCLUDE EXCHANGES FROM THE NATIONAL WILDLIFE FEDERATION LAWSUITS

There are so many problems with the amendment as proposed that its enactment would be counterproductive.

These comments discuss only the more serious problems that this amendment would create.

The amendment applies only to exchanges "proposed by the Secretary." Thus, it applies to proposals for exchange made by the Secretary of the Interior and the Secretary of Agriculture. It does not apply to the many exchanges proposed by others.

It duplicates requirements and procedures already established by other laws. The NEPA requirements are one example. This can only lead to confusion as to whether what appear to be the same requirements are really the same. If they are, there is no need to repeat them. If they are not, the differences are not apparent. This can only cause confusion and generate lawsuits.

The proposed amendment does not appear to apply to the FLPMA section 204(1) claims in the lawsuit. Thus, although the National Wildlife Federation may be willing (at least we assume this to be so) to forego its 204(1) allegations in order to allow exchanges that meet the requirements of this proposal, there are no assurances that others are willing to do likewise. If taken advantage of, this loophole could effectively nullify the amendment or at least result in another delaying factor.

The requirement that withdrawals be revoked in accordance with a land use plan would add a new requirement not required under existing statutory law.

This proposed amendment would seem to incorporate certain of the allegations as to noncompliance made in the National Wildlife Federation lawsuit.

If the argument is made that all the actions required to be taken to consummate an exchange would satisfy the requirements for revoking a withdrawal or classification, and that DLM has fulfilled all those requirements, so that the injunction can be lifted for exchanges, there would seem to be no reason for the lawsuit to be continued as to exchanges and the plaintiff should withdraw its allegations as to withdrawal and classification revocations or terminations relating to exchanges.

The amendment does not address what will happen if the preliminary injunction is modified or if the district court issues a permanent injunction in the National Wildlife Federation case.

In short, what the bill seeks to achieve indirectly is an amendment to the Federal Land Policy and Management Act to conform it to the objectives of the claimants in the litigation. We believe that this improperly gives credence to certain National Wildlife Federation allegations. In light of the status of the litigation it is premature.

If Congress wants to enact legislation to exclude exchanges from the National Wildlife Federation injunction a simple provision saying just that, without the additional "tag-on" requirements and conditions, is adequate.

[Enclosure 2]

COMMENTS CONCERNING "A DOCUMENTED CERTIFICATION MADE BY A QUALIFIED APPRAISER"

The suggestion has been made that exchanges appraised in this manner will be made at less than fair market value. In fact, utilizing this type of appraisal does not imply that exchanges will be consummated for less than fair market value. This type of appraisal requires a determination of market value by a qualified independent appraiser.

This type of appraisal permits the appraiser to present his market valuation in a brief, concise format. The appraiser will not be required to submit a formal, narrative report which includes a lengthy local, neighborhood and regional analysis; detailed discussion of comparable sales; indepth analysis of approaches to value; maps and exhibits, and other discussions normally required in a narrative appraisal report. The appraiser is not, however, relieved from the requirement to base his statement of value on comparable market information. The appraiser's personal files will retain information further substantiating the conclusion of value.

Utilizing a documented certification by a qualified appraiser will yield a time and cost savings to the government. Conversely, requiring a formal narrative appraisal has historically been more costly and time consuming.

We suggest that the term "statement of value" is a more appropriate term than the "documented certification". The latter is somewhat ambiguous and possibly confused with the appraiser's customary certification of no personal interest in the subject property. In contrast, the term "statement of value" clearly focuses on the appraiser's objective of valuing the properties.

ACT OF JULY 26, 1956

§ 505a. Interchange of lands between Department of Agriculture and military departments of Department of Defense; report to Congress

The Secretary of Agriculture with respect to national forest lands and the Secretary of a military department with respect to lands under the control of the military department which lie within or adjacent to the exterior boundaries of a national forest are authorized, subject to any applicable provisions of the Federal Property and Administrative Services Act of 1949, as amended [40 U.S.C.A. § 471 et seq.], to interchange such lands, or any part thereof, without reimbursement of transfer of funds whenever they shall determine that such interchange will facilitate land management and will provide maximum use thereof for authorized purposes: *Provided*, That no such interchange of lands shall become effective until forty-five days (counting only days occurring during any regular or special session of the Congress) after the submission to the Congress by the respective Secretaries of notice of intention to make the interchange.

([July 26, 1956, c. 736, 1, 70 Stat. 656.])

This provision delays exchanges for 45 days. This provision does not apply to BLM.

There is no requirement that BLM submit proposed exchanges to Congress.

§ 505b. Laws applicable

Any national forest lands which are transferred to a military department in accordance with this section and section 505a of this title shall be thereafter subject only to the laws applicable to other lands within the military installation or other public works project for which such lands are required and any lands which are transferred to the Department of Agriculture in accordance with this section and section 505a of this title shall become subject to the laws applicable to lands acquired under the Act of March 1, 1911 (36 Stat. 961), as amended.

(July 26, 1956, c. 736, § 2, 70 Stat. 657.)

SECTION 17(b)—NATIONAL FOREST MANAGEMENT ACT OF 1976

§ 521b. Report of Secretary of Agriculture prior to purchase or exchange of land; contents; waiting period

For purposes of providing information that will aid the Congress in its oversight responsibilities and improve the accountability of expenditures for the acquisition of forest land, the Secretary of Agriculture may not hereafter enter into any land purchase or exchange relating to the National Forest System of $25,000 or more for the types of lands which have been heretofore approved by the National Forest Reservation Commission until after 30 days from the date upon which a detailed report of the facts concerning such proposed purchase or transfer is submitted to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate or such earlier time as may be approved by both such committees. Such report shall contain at least the following:

(1) guidelines utilized by the Secretary in determing that the land should be acquired.

(2) the location and size of the land;

(3) the purchase price of the land and the criteria used by the Secretary in determining such price; and

(4) the person from whom the land is being acquired.

(Pub. L. 94-588, § 17(b), Oct. 22, 1976, 90 Stat. 2962; S.Res. 4, Feb. 4, 1977.)

This provision causes a delay in the exchange process.

This provision does not apply to BLM. There is no requirement on BLM to submit proposed exchanges to Congress.

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
Washington, DC, March 24, 1988.

Hon. J. BENNETT JOHNSTON,
Chairman, Committee on Energy and Natural Resources, Washington, DC.

DEAR MR. CHAIRMAN: This is in reply to your request for the views of this Department on H.R. 1860, a bill entitled the "Federal Land Exchange Facilitation Act of 1987." We have also included our response to questions posed by Members of the Committee at the March 14 hearing on H.R. 1860.

First of all, H.R. 1860 would amend a number of laws authorizing land exchanges. The stated purpose is to improve the exchange process. The Department of Agriculture wishes to emphasize strong support for the concept of this legislative proposal. We agree with the proponents of H.R. 1860 in the need to streamline the land exchange process and become more efficient at processing land exchange cases. Land exchanges should continue as the primary means of landownership adjustment. They should continue to be the preferred method of acquiring land needed to efficiently manage the National Forest System rather than that of direct purchase. Although we concur in principle with the purposes of H.R. 1860, we object to the bill as it is currently written. We would support the legislation if amended to conform with the Administrationi's proposed bill.

We note that H.R. 1860 is an improvement over a similar bill, H.R. 4814, which was considered by the 99th Congress. We also recognize that the House passed H.R. 1860 with amendments which incorporate some of our recommendations included with our substitute bill. We feel that H.R. 1860 could be further improved and, therefore, strongly encourage additional amendments.

We recommend a number of amendments to H.R. 1860, which would provide additional savings both in completion times and costs of land exchanges. These amendments are included in the Administration's substitute bill.

Additionally, we recommended that either H.R. 1860 or the substitute bill specifically address the effects of this legislation on other exchange authorities. This might be done by adding a sentence at the beginning of Section 10 of the substitute bill or at the end of Section 5 of H.R. 1860 stating that the Act is supplementary to existing authorities.

A number of questions were asked of both the Department of the Interior witness and the Department of Agriculture witness, which required followup information. The following is our response to these questions:

Question 1(a). Clarify the Forest Service interpretation of the timetable provisions of H.R. 1860.

Answer: The provision would establish a mandatory schedule for completing exchange appraisals, once both parties agree to proceed with an exchange proposal. The mandatory schedule could be altered through mutual agreement by the exchange parties.

Question 1(b). What are Forest Service objections to the timetable provisions?

Answer: We believe it is unrealistic to establish uniform timetables for exchange appraisals, due to the high degree of variability that exists between exchange proposals, reflecting the unique circumstances affecting each individual parcel of involved land. Since H.R. 1860 would allow negotiation between exchange parties to deviate from the legislated schedule and because the timetable does not start until the Forest Service and the non-Federal landowner have formally entered an agreement to pursue an exchange, the proposed timetable provision may be of little impact on the Forest Service. By not agreeing to an alternate timetable, however, a non-Federal landowner could, under H.R. 1860, force the Forest Service to accept a statutory timetable, which may be unrealistic.

Question 1(c). What are the suggested Forest Service changes to the timetable provisions?

Answer: The Forest Service already has authority to negotiate processing timetables for each exchange and we intend to provide clear guidelines for such negotiations in our Regulations. Therefore, given the complexity of some exchanges, such legislated timetables are unrealistic and should be deleted to avoid requirements that cannot be met.

Question 2(a). What are Forest Service objections to mandatory arbitration?

Answer: The idea of using arbitration to resolve differences in estimates of value among the parties involved in an exchange has some utility—in those situations in which all other aspects of the proposal are in the public interest and only the valuation issue remains unresolved. In those cases, arbitration between value estimates provided by the Forest Service appraisal and an appraisal furnished by the non-Federal landowner might be helpful. However, the election of such arbitration should be upon mutual agreement, rather than the unilateral election of arbitration by only one of the parties, as now provided in H.R. 1860. Valuation is one of the considerations in determining if it is in the public interest to proceed with an exchange. If, at the point of disagreement over values, the Forest Service recognizes that it will not be in the public interest to proceed with a proposal, then the unilateral election of arbitration can only result in unnecessary effort, costs, and delays.

Question 2(b). What is the concern that the arbitration provision of H.R. 1860 will violate the Appointments Clause of the Constitution?

Answer: We understand that the Department of Justice views the provision of H.R. 1860, which would impose binding arbitration (through a non-Federal arbitrator) on values, to be a violation of the Appointments Clause of the Constitution (U.S. Const., Art. II, Sec. 2, Cl. 2.), and that Justice would recommend a veto of H.R. 1860, if the bill were enacted with this provision in it.

Question 3. What is the Forest Service position on the provision for adjustment of values to relflect costs assumed by the other party?

Answer: The provision allowing adjustments of relative land values in order to compensate a party for assuming the other party's costs is written to make such election discretionary on the part of the Secretary concerned. Because the exercise of such au-

thority is entirely at the discretion of the Secretary concerned, we would not expect significant problems to result from this provision.

Question 4. Does the provision for approximately equal value exchanges up to $150,000 exempt such cases from determination of fair market value?

Answer: The approximately equal value provision of H.R. 1860 would not exempt such cases from a determination of fair market value. Rather, it would authorize the exchange of lands up to $150,000 in value without formal appraisal reports, while still requiring a full determination of fair market value by a qualified appraiser (Federal or contract), as approved by the Secretary. Such provision would eliminate the need to prepare complex written appraisal reports for small, relatively low-valued exchanges and would end the need to adjust small acreages or make minor cash payments to equalize land values.

Further, the Administration's Substitute Bill would provide for approximately equal value exchanges up to 5,000 acres in size or $500,000 in value. Such exchanges would have full appraisals by qualified appraisers (Federal or contract), as approved by the Secretary, along with formal appraisal reports. It would provide that when the differential in the final appraised values of the Federal and non-Federal lands are no more than 3 percent of the appraised value of the involved Federal lands, the Secretary concerned may determine the values to be approximately equal and complete the exchange without payment of cash equalization.

Question 5. Why shouldn't the Interior and Agriculture Agencies (BLM and Forest Service) draft identical regulations?

Answer: The Secretaries of the Interior and Agriculture cannot issue identical regulations pursuant to H.R. 1860, as each of the Departments exchange lands under different authorities. Only H.R. 1860 would grant common authority to both Secretaries. Otherwise, the Secretary of the Interior has principally the Federal Land Policy and Management Act of 1976 (FLPMA) as an exchange authority. The Secretary of Agriculture has the General Exchange Act of March 20, 1922 and the Weeks Act of March 1, 1911 as the principal exchange authorities, but also completes exchanges under any of approximately 100 other exchange authorities. FLPMA, with its same State and equal value requirements, and cash equalization provision, only serves to supplement Forest Service exchange authorities. While the regulations issued by each Secretary may be identical in part, reflecting common provisions of H.R. 1860 and FLPMA, each Secretary's regulations will be diverse, due to the difference in exchange authorities.

Question 6. Does the Forest Service have any problems with the Federal Land Policy and Management Act of 1976 (FLPMA)?

Answer: The Forest Service has not experienced any significant problems with FLPMA, except to the extent of the recommended changes specified in the Administration's Substitute Bill. Those of particular interest to Forest Service programs are the inclusion of Sections 7 and 9 and the "approximately equal value" provision in the proposed new subsection (e) to Sec. 206 of FLPMA.

The Office of Management and Budget advises that enactment of H.R. 1860, in its current form, would not be in accord with the program of the President.

Sincerely,

PETER C. MYERS,
Deputy Secretary.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, March 28, 1988.

Hon. J. BENNETT JOHNSTON,
U.S. Senate,
Washington, DC.

DEAR SENATOR JOHNSTON: This presents the views of the Department of Justice on H.R. 1860, the Federal Land Exchange Facilitation Act of 1987. Although the Department supports H.R. 1860's objective of streamlining procedures for the exchange of federal and private property, we must oppose the bill in its present form. Section 3(a) of the bill would impose binding arbitration on officers of the executive branch in disputes with private parties over the value of land. H.R. 1860, sec. 3(a), amending sec. 206 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1716. We believe that this provision would violate the Appointments Clause of the Constitution. U.S. Const., art. II, sec. 2, cl. 2.

The Constitution requires that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States" and must be appointed pursuant to the Appointments Clause. *Buckley* v. *Valeo,* 424 U.S. 1, 126 (1976). The Appointments Clause requires that all officers of the United States be appointed by the President, the heads of the Departments, or a court of law. *Id.* at 125. As presently drafted, H.R. 1860 would require the Secretaries of Interior and Agriculture to submit disputes with private parties over the price of certain lands "to an arbitration to be conducted in accordance with the real estate valuation arbitration rules of the American Arbitration Association. *Such arbitration shall be binding on the Secretary. . . .*" H.R. 1860, sec. 3(a) (emphasis added), amending FLPMA, sec. 206(d)(2).

We believe that the final determination of the value of land that the federal government owns or is going to exchange for federal land of equal value is a significant government function within the meaning of *Buckley, supra,* 424 U.S. at 126, 141. Land is a valuable federal resource and it is the Secretaries, as officers of the United States, who are accountable for its valuation and transfer. Therefore, an arbitrator who can issue a determination on the value of the land that is binding on the Secretaries would be executing the law. Accordingly, the arbitrator must be appointed pursuant to the Appointments Clause. Section 3(a) of the bill, however, makes no reference to the appointment of the arbitrator by the President or any other member of the Executive branch, so we must assume that the arbitrator will be appointed in conformity with the rules of the American Arbitration Society rather than the Appointments Clause. Unless H.R. 1860 is amended to provide for the appointment of the arbitrator as an Officer of the United States, the De-

partment of Justice will recommend to the President that he veto this bill if it reaches his desk.

The Office of Management and Budget has advised this Department that enactment of H.R. 1860 as currently drafted would not be in accord with the program of the President.

Sincerely,

THOMAS M. BOYD,
Acting Assistant Attorney General.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by the Act, H.R. 1860, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

(90 Stat. 2744, 2755; 43 U.S.C. 1715, et seq.)

* * * * * * *

SEC. 206. (a) A tract of public land or interests therein may be disposed of by exchange by the Secretary under this Act and a tract of land or interests therein within the National Forest System may be disposed of by exchange by the Secretary of Agriculture under applicable law where the Secretary concerned determines that the public interest will be well served by making that exchange: *Provided,* That when considering public interest the Secretary concerned shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary concerned finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.

(b) In exercising the exchange authority granted by subsection (a) or by section 205(a) of this Act, the Secretary *concerned* may accept title to any non-Federal land or interests therein in exchange for such land, or interests therein which he finds proper for transfer out of Federal ownership and which are located in the same State as the non-Federal land or interest to be acquired. For the purposes of this subsection, unsurveyed school sections which, upon survey by the Secretary, would become State lands, shall be considered as "non-Federal lands". The values of the lands exchanged by the Secretary under this Act and by the Secretary of Agriculture under applicable law relating to lands within the National Forest System either shall be equal, or if they are not equal, the values will be equalized by the payment of money to the grantor or to the Secretary concerned as the circumstances require so long as payment does not exceed 25 per centum of the total value of the lands or interests transferred out of Federal ownership. *The Secretary con-*

cerned and the other party or parties involved in the exchange may mutually agree to waive the requirement for the payment of money to equalize values where the Secretary concerned determines that the exchange will be expedited thereby and that the public interest will be better served by such a waiver of cash equalization payments and where the Secretary and where the amount to be waived is no more than 3 per centum of the value of the lands being transferred out of Federal ownership or $15,000, whichever is less. The Secretary concerned shall try to reduce the amount of the payment of money to as small an amount as possible.

[(c) Lands acquired by exchange under this section by the Secretary which are within the boundaries of the National Forest System may be transferred to the Secretary of Agriculture and shall then become National Forest System lands and subject to all the laws, rules, and regulations applicable to the National Forest System. Lands acquired by exchange by the Secretary under this section which are within the boundaries of National Park, Wildlife Refuge, Wild and Scenic Rivers, Trails, or any other System established by Act of Congress may be transferred to the appropriate agency head for administration as part of such System and in accordance with the laws, rules, and regulations applicable to such System.]

(c) Lands acquired by the Secretary by exchange under this section which are within the boundaries of any unit of the National Forest System, National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Trails System, National Wilderness Preservation System, or any other system established by Act of Congress, or the boundaries of the California Desert Conservation Area, or the boundaries of any national conservation area or national recreation area established by Act of Congress, upon acceptance of title by the United States shall immediately be reserved for and become a part of the unit or area within which they are located, without further action by the Secretary, and shall thereafter by managed in accordance with all laws, rules, and regulations applicable to such unit or area.

(d)(1) No later than ninety days after entering into an agreement to initiate an exchange of land or interests therein pursuant to this Act or other applicable law, the Secretary concerned and other party or parties involved in the exchange shall arrange for an appraisal (to be completed within a time frame and under such terms as are negotiated by the parties) of the lands or interests therein involved in the exchange in accordance with subsection (f) of this section.

(2) If within one hundred and eighty days after the submission of an appraisal or appraisals for review and approval by the Secretary concerned, the Secretary concerned and the other party or parties involved cannot agree to accept the findings of an appraisal or appraisals, the appraisal or appraisals shall be submitted to an arbitrator appointed by the Secretary from a list of arbitrators submitted to him by the American Arbitration Association for arbitration to be conducted in accordance with the real estate valuation arbitration rules of the American Arbitration Association. Such arbitration shall be binding for a period of not to exceed two years on the Secretary concerned and the other party or parties involved in the ex-

change insofar as concerns the value of the lands which were the subject of the appraisal or appraisals.

(3) Within thirty days after the completion of the arbitration, the Secretary concerned and the other party or parties involved in the exchange shall determine whether to proceed with the exchange, modify the exchange to reflect the findings of the arbitration or any other factors, or to withdraw from the exchange. A decision to withdraw from the exchange may be made by either the Secretary concerned or the other party or parties involved.

(4) Instead of submitting the appraisal to an arbitrator, as provided in paragraph (2) of this section, the Secretary concerned and the other party or parties involved in an exchange may mutually agree to employ a process of bargaining or some other process to determine the values of the properties involved in the exchange.

(5) The Secretary concerned and the other party or parties involved in an exchange may mutually agree to suspend or modify any of the deadlines contained in this subsection.

(e) Unless mutually agreed otherwise by the Secretary concerned and the other party or parties involved in an exchange pursuant to this Act or other applicable law, all patents or titles to be issued for land or interests therein to be acquired by the Federal Government and lands or interest therein to be transferred out of Federal ownership shall be issued simultaneously after the Secretary concerned has taken any necessary steps to assure that the United States will receive acceptable title.

(f)(1) Within one year after the enactment of subsections (d) through (i) of this section, the Secretaries of the Interior and Agriculture shall promulgate new and comprehensive rules and regulations governing exchanges of land and interests therein pursuant to this Act and other applicable law. Such rules and regulations shall fully reflect the changes in law made by subsections (d) through (i) of this section and shall include provisions pertaining to appraisals of lands and interests therein involved in such exchanges.

(2) The provisions of the rules and regulations issued pursuant to paragraph (1) of this subsection governing appraisals shall reflect nationally recognized appraisal standards, including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisitions: Provided, however, That the provisions of such rules and regulations shall—

(A) ensure that the same nationally approved appraisal standards are used in appraising lands or interest therein being acquired by the Federal Government and appraising lands or interests therein being transferred out of Federal ownership; and

(B) with respect to costs or other responsibilities or requirements associated with land exchanges—

(i) recognize that the parties involved in an exchange may mutually agree that one party (or parties) will assume, without compensation, all or part of certain costs or other responsibilities or requirements ordinarily borne by the other party or parties; and

(ii) also permit the Secretary concerned, where such Secretary determines it is in the public interest and it is in the best interest of consummating an exchange pursuant to this

Act or other applicable law, and upon mutual agreement of the parties, to make adjustments to the relative value involved in an exchange transaction in order to compensate a party or parties to the exchange for assuming costs or other responsibilities or requirements which would ordinarily be borne by the other party or parties.

As used in this subparagraph, the term "costs or other responsibilities or requirements" shall include, but not be limited to, costs or other requirements associated with land surveys and appraisals, mineral examinations, title searches, archeological surveys and salvage, removal of encumbrances, arbitration pursuant to subsection (d) of this section, curing deficiencies preventing highest and best use, and other costs to comply with laws, regulations and policies applicable to exchange transactions, or which are necessary to bring the Federal or non-Federal lands or interests involved in the exchange to their highest and best use for the appraisal and exchange purposes. Prior to making any adjustments pursuant to this subparagraph, the Secretary concerned shall be satisfied that the amount of such adjustment is reasonable and accurately reflects the approximate value of any costs or services provided or any responsibilities or requirements assumed.

(g) Until such time as new and comprehensive rules and regulations governing exchange of land and interests therein are promulgated pursuant to subsection (f) and this section, land exchanges may proceed in accordance with existing laws and regulations, and nothing in the Act shall be construed to require any delay in, or otherwise hinder, the processing and consummation of land exchanges pending the promulgation of such new and comprehensive rules and regulations. Where the Secretary concerned and the party or parties involved in an exchange have agreed to initiate an exchange of land or interests therein prior to the day of enactment of such subsections, subsections (d) through (i) of this section shall not apply to such exchanges unless the Secretary concerned and the party or parties involved in the exchange mutually agree otherwise.

(h)(1) Notwithstanding the provisions of this Act and other applicable laws which require that exchanges of land or interests therein be for equal value, where the Secretary concerned determines it is in the public interest and that the consummation of a particular exchange will be expedited thereby, the Secretary concerned may exchange lands or interests therein which are of approximately equal value in cases where—

(A) the combined value of the lands or interests therein to be transferred from Federal ownership by the Secretary concerned in such exchange is not more than $150,000; and

(B) the Secretary concerned finds in accordance with the regulations to be promulgated to subsection (f) of this section that a determination of approximately equal value can be made without formal appraisals, as based on a statement of value made by a qualified appraiser and approved by an authorized officer; and

(C) the definition of and procedure for determining "approximately equal value" has been set forth in regulations by the Secretary concerned and the Secretary concerned documents

how such determination was made in the case of the particular exchange involved.

(2) As used in this subsection, the term "approximately equal value" shall have the same meaning with respect to lands managed by the Secretary of Agriculture as it does in the Act of January 22, 1983 (commonly known as the "Small Tracts Act").

(i)(1) Upon receipt of an offer to exchange lands or interests in lands pursuant to this Act or other applicable laws, at the request of the head of the department agency having jurisdiction over the lands involved, the Secretary of the Interior may temporarily segregate the Federal lands under consideration for exchange from appropriation under the mining laws. Such temporary segregation may only be made for a period of not to exceed five years. Upon a decision not to proceed with the exchange or upon deletion of any particular parcel from the exchange offer, the Federal lands involved or deleted shall be promptly restored to their former status under the mining laws. Any segregation pursuant to this paragraph shall be subject to valid existing rights as of the date of such segregation.

(2) All non-Federal lands which are acquired by the United States through exchange pursuant to this Act or pursuant to other law applicable to lands managed by the Secretary of Agriculture shall be automatically segregated from appropriation under the public land law, including the mining laws, for ninety days after acceptance of title by the United States. Such segregation shall be subject to valid existing rights as of the date of such acceptance of title. At the end of such ninety day period, such segregation shall end and such lands shall be open to operation of the public land laws and to entry, location, and patent under the mining laws except to the extend otherwise provided by this Act or other applicable law, or appropriate actions pursuant thereto.

NATIONAL FOREST MANAGEMENT ACT OF 1976

(90 Stat. 2949, 2962; 16 U.S.C. 521b)

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SEC. 17. (a) * * *

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(b) For purposes of providing information that will aid the Congress in its oversight responsibilities and improve the accountability of expenditures for the acquisition of forest land, the Secretary of Agriculture may not hereafter enter into any land purchase or exchange relating to the National Forest System of **[**$25,000**]** *$150,000* or more for the types of lands which have been heretofore approved by [the National Forest Reservation Commission] until after 30 days from the date upon which a detailed report of the facts concerning such proposed purchase or transfer is submitted to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture and Forestry of the Senate or such earlier time as may be approved by both such committees. Such report shall contain at least the following:

(1) guidelines utilized by the Secretary in determining that the land should be acquired;

(2) the location and size of the land;

(3) the purchase price of the land and the criteria used by the Secretary in determining such price; [and]

(4) the person from whom the land is being acquired[.]; *and*

(5) any adjustment made by the Secretary of relative value pursuant to section 206(f)(2)(B)(ii) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716).

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ACT OF JULY 26, 1956

(70 Stat. 656; 16 U.S.C. 505a and 505b)

SEC. 1. The Secretary of Agriculture with respect to [national forest lands] *National Forest System lands* and the Secretary of a military department with respect to lands under the control of the military department which lie within or adjacent to the exterior boundaries of [a national forest] *a unit of the National Forest System* are authorized, subject to any applicable provisions of the Federal Property and Administrative Services Act of 1949, as amended, to interchange such lands, or any part thereof, without reimbursement or transfer of funds whenever they shall determine that such interchange will facilitate land management and will provide maximum use thereof for authorized purposes: *Provided,* That no such interchange of lands shall become effective until forty-five days (counting only days occurring during any regular or special session of the Congress) after the submission to the Congress by the respective Secretaries of notice of intention to make the interchange.

SEC. 2. Any [national forest lands] *National Forest System lands* which are transferred to a military department in accordance with this Act shall be thereafter subject only to the laws applicable to other lands within the military installation or other lands within the military installation or other public works project for which such lands are required and any lands which are transferred to the Department of Agriculture in accordance with this Act shall become subject to the laws applicable to lands acquired under the Act of March 1, 1911 (36 Stat. 961), as amended. *Lands interchanged under the authority of this Act shall be deemed to include interests in lands.*